

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 28, 2009 Session

STATE OF TENNESSEE v. PONCHO JUAN DELGADO

**Direct Appeal from the Criminal Court for Washington County
No. 33011 Robert E. Cupp, Judge**

No. E2008-01228-CCA-R9-CD - Filed February 5, 2010

A Washington County Grand Jury indicted the defendant, Poncho Juan Delgado, for first degree premeditated murder and arson. After the first day of trial, the case was delayed due to the illness of the judge. The trial court subsequently declared a mistrial and denied the defendant's motion to dismiss the indictment against him because of double jeopardy. The trial court granted the defendant's request for an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. Upon review, we affirm the ruling of the trial court.

Tenn. R. App. P. 9 Interlocutory Appeal; Order of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

James T. Bowman and Matthew A. Carter, Johnson City, Tennessee, for the appellant, Poncho Juan Delgado.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Senior Counsel; Anthony Wade Clark, District Attorney General; and Dennis Brooks and Erin McArdle, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The record before us reflects that the defendant's trial on the charges of first degree murder and arson began in the Washington County Criminal Court on April 8, 2008. In the early morning hours of April 9, 2008, the trial judge became seriously ill with pneumonia and entered the hospital for treatment. No further action was had on the case until April 22,

2008, when the trial court held a hearing to determine whether the trial should proceed or if a mistrial should be declared.

At the hearing, jurors testified that on the morning of April 9, 2008, the court clerk notified them that the defendant's trial would be delayed a day due to the judge's illness. Either later that afternoon or early the next morning, the clerk left jurors a voice mail message that the trial was "cancelled." At least one juror called the clerk's office for further clarification. Several jurors stated that they were instructed to report back to the jury pool, and one juror served on a jury for another murder trial.

Testimony from each of the jurors established that because of the "cancellation" of the trial, they believed they had no further obligations with respect to the case. After they were notified that the trial was cancelled, several jurors read local newspaper articles about the trial and discussed the case with others. Two of the jurors who reported back to the jury pool discussed discrepancies between a witness' testimony and newspaper accounts of that testimony. Two other jurors also had a conversation about newspaper coverage. Some jurors testified that family members and others not involved in the case expressed opinions about the case to them. Through discussions about the case, one juror learned that some of the defendant's distant relatives were involved in a ministry in which she participated. Despite these outside influences, the jurors uniformly testified that they could perform their duties in the defendant's case.

After the conclusion of the jurors' testimony, defense counsel reluctantly requested a mistrial, stating that he believed he was "goaded" into the request. However, he acknowledged that the judge, the State, and the jurors had not engaged in bad conduct. The trial court granted the defense's motion for a mistrial, finding that the separation of the jury required such action. The court noted that, generally, when defense counsel's motion for a mistrial is granted, counsel cannot then complain about a retrial on double jeopardy grounds. However, the trial court stated, "[T]his court takes the position that that's not the case here. [Defense counsel] moved for a mistrial because he thought that that was what he should do in the best interest of his client." Therefore, the court found that defense counsel should not be held "accountable in that way because he did what he thought was right, and that was what I would have done had I been sitting there also."

In granting the mistrial, the trial court explained:

I'm concerned that that separation was so long, and . . . the fact that [the jurors] may have discussed it with other people – one juror even served on another jury – would put this defendant at a position I just did not want to put him in. . . . And so . . . the only thing left for me to do is to declare the mistrial. And

[defense counsel] says, Judge, you have no other alternative. We can't use this panel because of what went forth. And even though I may have different feelings one way or the other about that, just the delay itself is a concern for this defendant. And I have to assure that this defendant receives a fair trial. . . . I've already put in the record that [defense counsel] was put in the position that he didn't have any alternative except to do it the way he did.

Accordingly, the trial court declared a mistrial on the basis of manifest necessity. The defendant moved the court to dismiss the charges against him because of double jeopardy. The trial court found that manifest necessity existed for the mistrial and therefore double jeopardy concerns did not preclude retrial. On appeal, the defendant argues that the prohibition against double jeopardy precludes a retrial on the charges.

II. Analysis

On appeal, the defendant contends that the court clerk's message informing the jurors that the trial was "cancelled" resulted in a "de facto mistrial" and prevented a retrial on double jeopardy grounds. The defendant contends that while he "ultimately moved for a mistrial, thus consenting thereto, he clearly was afforded no opportunity to object to the 'cancellation' of the trial." The defendant does not maintain that the State was in anyway responsible for the mistrial or that the trial court "acted in bad faith or with any bad intent."

The double jeopardy clauses of the United States and Tennessee constitutions protect an accused from: (1) a second prosecution following an acquittal; (2) a second prosecution following conviction; and (3) multiple punishments for the same offense. State v. Denton, 938 S.W.2d 373, 378 (Tenn. 1996). Because jeopardy attaches when a jury is empaneled and sworn, constitutional protections against multiple prosecutions for the same offense also include a defendant's "'right to have his trial completed by a particular tribunal.'" State v. Smith, 871 S.W.2d 667, 671 (Tenn. 1994) (quoting Oregon v. Kennedy, 456 U.S. 667, 671 (1982)). However, the State is not automatically prohibited from reprosecuting a defendant if the trial fails to end in a final judgment. State v. Carter, 890 S.W.2d 449, 452 (Tenn. Crim. App. 1994).

Generally, "a retrial is permitted where there is a 'manifest necessity' for the declaration of the mistrial, regardless of the defendant's consent or objection." State v. Mounce, 859 S.W.2d 319, 321 (Tenn. 1993). For example, "[i]f it appears that some matter has occurred which would prevent an impartial verdict from being reached, a mistrial may be declared and a claim of double jeopardy would not prevail on a subsequent trial." Id. (quoting Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1978)). The decision to

grant a mistrial lies within the sound discretion of the trial court, and this court will not interfere with the exercise of that discretion absent clear abuse appearing on the face of the record. See State v. Hall, 976 S.W.2d 121, 147 (Tenn. 1998).

The defendant essentially complains that the trial court unofficially declared a mistrial when the court clerk informed the jurors that the trial was “cancelled.” In arguing this point to the trial court, defense counsel repeatedly referred to such action as a “de facto mistrial.” However, defense counsel conceded to the trial court that he had no case law to support his contention that the clerk’s message to jurors resulted in a “de facto mistrial” and precluded retrial. Likewise, we can find no case law to support the defendant’s contention. As the defendant acknowledges, Tennessee case law reflects that “‘courts speak only through their minutes [and orders].’” State v. Byington, 284 S.W.3d 220, 225 (Tenn. 2009) (quoting Mullen v. State, 51 S.W.2d 497, 498 (Tenn. 1932)); see also In re Adoption of E.N.R., 42 S.W.3d 26, 31 (Tenn. 2001). A mistrial was not declared on the record until May 14, 2008.

As the defendant acknowledges, the mistrial was granted upon motion of the defendant. Retrial after a mistrial is declared typically does not violate double jeopardy concerns “if the defendant through his counsel actively sought or consented to premature termination of the proceedings.” State v. Knight, 616 S.W.2d 593, 596 (Tenn. 1981). However, if the defendant was “goaded” into requesting a mistrial, the appellant has not voluntarily relinquished his right to proceed before the first jury, and the appellant may not be subjected to retrial. See United States v. Dinitz, 424 U.S. 600, 608 (1976); State v. Smith, 810 S.W.2d 155, 157 (Tenn. Crim. App. 1991). For double jeopardy to protect a defendant who requested a mistrial from being subjected to retrial, the prosecution must intend for the appellant to make a motion for mistrial. Kennedy, 456 U.S. at 676; see also State v. Tucker, 728 S.W.2d 27, 31 (Tenn. Crim. App. 1986).

The defendant concedes that he did not request a mistrial based upon the bad conduct of either the State or the trial court. Nevertheless, the trial court stated that it would not, in determining whether double jeopardy prevented retrial, hold the defendant’s request against him. However, the Supreme Court has stated that “where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant’s motion is necessitated by prosecutorial or judicial error.” United States v. Jorn, 400 U.S. 470, 485 (1971).

Regardless of the defendant’s consent to the mistrial, we conclude that in the instant case, there was a manifest necessity for the declaration of the mistrial. In the instant case, after the completion of the first day of trial, Tuesday, April 8, 2008, the judge became ill with pneumonia and had to be hospitalized. On Wednesday, April 9, 2008, the judge had the court clerk postpone the trial by a day, thinking he would return soon. On the afternoon of

April 9 or the morning of April 10, the jurors received a message from the court clerk that the trial had been “cancelled.” Court reconvened on April 22, 2008. At the hearing on whether the trial could resume or a mistrial should be declared, the court learned that most of the jurors had been exposed to outside influences between April 9 and April 22 and that several jurors had discussed the case with each other, family, or friends.

The manifest necessity for granting the mistrial in this case is two-fold. First, we note our case law reflects that

retrial will not be prohibited by double jeopardy principles where the ends of justice, under the circumstances, would otherwise be defeated, or where the circumstances show that a fair and unbiased trial could not be had, or where any unforeseen emergency, contingency, or happening after the empaneling of the jury prevents the trial from going forward according to orderly and established legal procedure.

Smith, 871 S.W.2d at 672. The Supreme Court has observed that a trial is “even in the best of circumstances, a complicated affair . . . dependent in the first instance on the most elementary sort of considerations, e.g., the health of the various witnesses, parties, attorneys, jurors, etc., all of whom must be prepared to arrive at the courthouse at set times.” Jorn, 400 U.S. at 479-80. As such, other jurisdictions have found “that illness of the judge preventing continuation of the trial [for a significant period of time] . . . at the least constitutes ‘manifest necessity’ for the declaration of a mistrial.” Commonwealth v. Robson, 337 A.2d 573, 622 (Pa. 1975); see also Curry v. Superior Court, 470 P.2d 345, 348 (Cal. 1970); State ex rel. Brooks v. Worrell, 190 S.E.2d 474, 476 (W. Va. 1972).

The defendant complains that the trial judge “did not request another judge finish the case as is permitted by Rule 25, Tennessee Rules of Criminal Procedure.” We agree that Rule 25 provides an alternative for judges who become ill during a trial. Tenn. R. Crim. P. 25(a) (stating that a judge may complete a jury trial for another judge who is unable to complete the trial due to sickness as long as the replacement judge “certifies that he or she has become familiar with the record of the trial”). We also recognize that “[a] trial court should, of course, always consider alternatives to a mistrial.” Smith, 871 S.W.2d at 673. However, the trial judge in this case explained that he did not exercise this option due to the full schedules of the judges he could have called as a replacement and because he anticipated returning to the bench more quickly than he was able. The judge’s illness led to a miscommunication and an unfortunate delay in the proceedings which could very well have impacted the course of the trial, contributing to the need for a mistrial.

The need for a mistrial was compounded by the fact that during the delay of the trial, the jurors were exposed to multiple outside influences, namely news coverage of the trial and discussions with others concerning the trial. The jurors testified that they could perform their duties, unsullied by these outside influences. We, like the trial court, are impressed with the jurors' open-mindedness. However, "[i]f it appears that some matter has occurred which would prevent an impartial verdict from being reached, a mistrial may be declared and a claim of double jeopardy would not prevail on a subsequent trial." Arnold, 563 S.W.2d at 794; cf. Clark v. State, 97 S.W.2d 644, 646 (Tenn. 1936) (stating that "after the discharge of a jury in a felony case and the separation of the jurors to such a degree that outside contacts may have been even momentarily had, the members of that jury may not be reconvened for the taking of any action whatever involving the fate of the accused").

We recognize that a mistrial should be granted only after an exercise of great caution. See State v. Witt, 572 S.W.2d 913, 917 (Tenn. 1978). Given the unique circumstances of the instant case, namely the delay due to the judge's illness and the jury's exposure to outside influences, we agree with the trial court that manifest necessity required a mistrial be declared. Because there was manifest necessity for the mistrial, a retrial is not prohibited on double jeopardy grounds.

III. Conclusion

Concluding no error exists, we affirm the order of the trial court.

NORMA McGEE OGLE, JUDGE